

Honorable Judge Benjamin H. Settle

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA**

CLYDE RAY SPENCER ,

Plaintiff,

v.

JAMES M. PETERS, et al.,

Defendants.

NO. C11-5424 BHS

DEFENDANTS' RESPONSE TO
PLAINTIFF'S MOTIONS IN LIMINE

**NOTED ON MOTION CALENDAR:
Friday, December 13, 2013**

ORAL ARGUMENT REQUESTED

Defendants Davidson and Krause jointly request that plaintiff's motions in limine should be denied for the reasons stated below.

I. LAW AND ARGUMENT

A. Summary of Overarching Issues Pertaining to Defendants' Responses

Plaintiff essentially seeks to prevent the jury from hearing any evidence inconsistent with his theory of liability. For example, he argues the jury should be precluded from reviewing and hearing testimony about several of Detective Krause's police reports, and the few that the jury should be allowed to review should be substantially redacted throughout to remove any information that is remotely unfavorable to plaintiff. He also argues that defendants should be precluded from calling most of their witnesses, and the few remaining witnesses should be prohibited from testifying about anything he considers unfavorable to him.

Plaintiff's motions in limine overlook several key components of his burden of proof in the course of arguing most of defendant's witnesses and exhibits are immaterial to the remaining issues in this case. One of the primary facets of this case overlooked in plaintiff's motions in limine is that to establish liability for alleged deliberate fabrication of false evidence, plaintiff "must, *at a minimum*, point to evidence that ... Defendants continued their investigation ... despite the fact that they knew or should have known that he was innocent" *Devereaux v. Abbey*, 263 F.3d 1070, 1076 (9th Cir. 2001) (italics in original; underlining added); *see also id.* at 1077 ("What is required is ... a showing that the interviewer knew or should have known that the alleged perpetrator was innocent"). This burden requires "a specific affirmative showing of dishonesty" by Davidson and Krause. *Id.* at 1076. In order to rebut plaintiff's deliberate fabrication claim, defendants are thus entitled to present evidence showing that defendants did not know plaintiff was innocent, and further that an objectively reasonable investigator or interviewer would not have known plaintiff was innocent. Thus, for example, evidence that the prosecutor who interviewed Kathryn Spencer (James Peters), the Judge who sentenced him (Thomas Lodge), the Chief of Police of plaintiff's former employer (Leland Davis), and another prosecutor who reviewed Shirley Spencer's letter documenting Kathryn Spencer's initial disclosure and other material (Rebecca Roe) did not believe plaintiff was innocent is probative of defendants' theory of the case, even though it is unhelpful to plaintiff's theory of the case. Similarly, Krause's and Davidson's character for truthfulness is both directly and indirectly being attacked via plaintiff's deliberate fabrication of evidence claim, so reputation evidence concerning their integrity and honesty is relevant and admissible under FRE 608(a).

Another facet of this case that plaintiff's motions in limine overlooks is that the requisite proof that probable cause was lacking to support plaintiff's arrest and prosecution also involves

1 an objective test. *See, e.g.*, 9th Cir. Model Civil Jury Instrs. 9.20 (“Probable cause exists when,
 2 under all of the circumstances known to the officers at the time, an objectively reasonable police
 3 officer would conclude there is a fair probability that the plaintiff has committed or was
 4 committing a crime”; emphasis added). All of the circumstances known to Davidson and
 5 Krause during the course of the investigation culminating in plaintiff’s *Alford* plea of guilty are
 6 thus relevant and admissible, including all of the information identified in all of Krause’s police
 7 reports. Moreover, evidence from non-parties, such as Ms. Roe and Leland Davis, that they,
 8 too, independently believed probable cause existed is relevant and admissible.

10 The jury conceivably could find there was probable cause for plaintiff’s arrest based
 11 solely on Shirley Spencer’s written description of Kathryn’s disclosure of sexual abuse before
 12 Davidson or Krause began the investigation. In other words, the jury conceivably could find
 13 probable cause existed, which is a complete defense to plaintiff’s false arrest, malicious
 14 prosecution and false imprisonment claims, even if the jury concludes some of Krause’s
 15 quotations of children’s disclosures were fabricated. Thus, defendants should be permitted to
 16 present all of the circumstances supporting probable cause, or that could contribute to an
 17 objectively reasonable person’s belief that plaintiff was not innocent.

19 Plaintiff’s motions in limine also overlook his burden to prove that defendants
 20 proximately caused his alleged damages, which all flow from his imprisonment following his
 21 *Alford* plea. If a superseding or intervening cause led to his imprisonment, defendants are not
 22 liable. *E.g., Osborn v. Butler*, 712 F.Supp.2d 1134, 1159-60 (D. Idaho 2010) (where the injury
 23 complained of is imprisonment by court order, “the order of the court would be the proximate
 24 cause and the various preliminary steps would be remote causes ...”); *McSherry v. City of Long*
 25 *Beach*, 584 F.3d 1129, 1137 (9th Cir. 2009), *cert. denied*, 131 S.Ct. 79 (2010) (“the prosecutor’s

independent decision can be a superseding or intervening cause of a constitutional tort plaintiff's injury, precluding suit against the officials who made an arrest or procured a prosecution"). Defendants should thus be permitted to present evidence establishing their theory that plaintiff is unable to prove proximate cause due to the existence of superseding or intervening causes by calling witnesses and providing evidence of the independence of the judgments exercised by prosecutors and/or the sentencing court.

These overarching issues underlay many of defendants' responses to plaintiff's motions in limine. In addition, defendants provide the following specific responses to each motion.

B. Defendants' Responses to Plaintiff's Motions in Limine

1. Motions to bar the defense from publishing and/or eliciting testimony related to irrelevant and highly prejudicial allegations of unconvicted prior bad acts.

Plaintiff cites FRE 404(a) and FRE 404(b) in support of his request to bar what he characterizes as "irrelevant and highly prejudicial allegations of [his] unconvicted prior bad acts" documented in defendant Krause's reports, but fails to discuss the applicable language in FRE 404. FRE 404 provides in relevant part as follows:

(a) Character Evidence.

(1) Prohibited Uses. Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.

...

(3) Exceptions for a Witness. Evidence of a witness's character may be admitted under Rules 607, 608, and 609.

(b) Crimes, Wrongs, or Other Acts.

(1) Prohibited Uses. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) Permitted Uses: ... This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.

The list of other purposes in FRE 404(b)(2) is illustrative, not exhaustive. *U.S. v. Cruz-Garcia*,

1 344 F.3d 951, 955 (9th Cir. 2003); *see also* *U.S. v. Rosa*, 11 F.3d 315, 333-34 (2nd Cir. 1993).

2 If evidence is admissible under FRE 404(b), it must also be considered under FRE 403
3 and a determination made whether its probative value is substantially outweighed by the danger
4 of unfair prejudice. *U.S. v. Cruz-Garcia*, 344 F.3d at 956. Under FRE 403, “[e]vidence is
5 unfairly prejudicial only if it has ‘an undue tendency to suggest decision on an improper basis,
6 commonly, though not necessarily, an emotional one.’ Advisory Committee’s Note, F.R.Evid.
7 403.” *Carter v. Hewitt*, 617 F.2d 961, 972 (3rd Cir. 1980). As explained below, none of the
8 evidence challenged by plaintiff is inadmissible under these rules.
9

10 **a. Accusations related to Rhonda Short**

11 Plaintiff cites portions of defendant Krause’s reports documenting information provided
12 by DeAnne Spencer regarding accusations that plaintiff had raped a “female adult neighbor,”¹
13 Rhonda Short, in November of 1978, and moves to exclude any reference to Rhonda Short or
14 descriptions of the alleged rape under FRE 404(a) and (b) as impermissible character and bad
15 acts evidence. Because this is evidence of a crime, wrong or other act, FRE 404(b) provides the
16 proper standard for determination of admissibility.
17

18 The Rhonda Short information is not being offered by defendants to prove plaintiff’s
19 character in order to show that on any particular occasion he acted in accordance with that
20 character, so it is not prohibited by FRE 404(b)(1). Rather, it is being offered for the permitted
21 purpose under FRE 404(b)(2) of providing the jury with all of the facts and circumstances
22 defendants were aware of while investigating the allegations that plaintiff had raped and
23 molested his children and step-child approximately six years later, and it is probative of whether
24

25
26 ¹ DeAnne reported that Rhonda Short was living with her parents, that she was nineteen years old when the alleged rape occurred, and that she was “emotionally very, very immature.” Declaration of Jeffrey Freimund (“Freimund Decl.”) at Ex. 1, pp. 9-10 (Krause report of October 18, 1984 interview of DeAnne Spencer).

1 defendants should have known that plaintiff was innocent while conducting the investigation.

2 From the outset plaintiff has portrayed himself as “a decorated police officer” who “had
3 no record of any wrongdoing of any kind in his entire life that suggested he could be capable of
4 such vicious acts against his own children....” Dkt. 1, p. 14, ll. 8-13. Defendants are entitled to
5 introduce all of defendant Krause’s investigative reports including those containing the Rhonda
6 Short information, not just the reports or excerpts of reports which plaintiff believes are helpful
7 to his claims, so the jury will see and hear all of the information defendants were aware of
8 during the investigation and can fairly assess whether defendants knew or should have known
9 plaintiff was innocent.
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11 The highly probative value of the Rhonda Short information is not outweighed by the
12 danger of unfair prejudice to plaintiff. The fact that it undermines his claim to having led an
13 impeccably perfect life does not make the evidence unfairly prejudicial, as it would not have an
14 undue tendency to suggest decision on an improper basis. Rather, it simply is one of the
15 numerous items of information made known to defendants while conducting the investigation.
16

17 **b. Alleged infidelity**

18 Plaintiff moves to exclude evidence of accusations by both DeAnne Spencer and Shirley
19 Spencer that plaintiff engaged in numerous affairs while they were each married to him, on the
20 sole ground that this evidence is irrelevant. In support, plaintiff emphasizes the affairs were
21 with adult females, and so cannot be relevant “to the issue of whether Defendants fabricated
22 reports stating that he had sexually abused three children under the age of nine.”
23

24 Once again, plaintiff is incorrectly narrowing the scope of the issues the jury is to
25 consider. The extra-marital affair information reported by plaintiff’s ex-wives is relevant to
26 defendants’ understanding of the dynamics involved in the household of the suspect and victims

1 under investigation, and also to the credibility or potential bias of the reporting witnesses. While
 2 providing training, Krause prepared and utilized an outline entitled “Investigating Child Sexual
 3 Abuse Allegations,” which plaintiff has listed and defendants have stipulated will be admitted as
 4 an exhibit at trial. The outline specifically identifies the need to interview (a) parents of the
 5 alleged victim to elicit information about the suspect’s background, (b) the suspect’s prior
 6 spouses for relevant information, including adult sexual partners, and (c) the suspect for
 7 information addressing sexual characteristics, including extramarital affairs. Freimund Decl. at
 8 Ex. 2, pp. 1-3, 5-8. Defendants are entitled to explain to the jury the information obtained
 9 concerning plaintiff’s affairs and the use made of it in conducting the investigation, in
 10 combination with all of the other information learned, so they can fairly present to the jury their
 11 defense that they conducted a thorough and unbiased investigation of plaintiff covering all
 12 proper subjects of inquiry, and that the information learned in total did not cause them to
 13 conclude, and should not have caused them to conclude, that plaintiff was innocent.

16 **c. Alleged gun confiscation**

17 Plaintiff moves to exclude evidence that one of Krause’s reports contains information
 18 from a witness (DeAnne Spencer) describing how plaintiff had confiscated guns while working
 19 as a police officer, some of which he kept. The only ground advanced in support is that this
 20 evidence constitutes impermissible character and/or prior bad act evidence. Once again, FRE
 21 404(b) provides the relevant standard, and the evidence is permitted under FRE 404(b)(2)
 22 because it is not being offered to prove that plaintiff acted in accordance with a character trait.
 23 Rather, as with all of the other unfavorable excerpts from Krause’s interview reports plaintiff
 24 seeks to keep from the jury, it is relevant to defendants’ theory of the case that they conducted a
 25 thorough and unbiased investigation of plaintiff covering all proper subjects of inquiry, and the
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1 information learned in total did not cause them to conclude, and should not have caused them to
 2 conclude, that they were investigating an innocent suspect.

3 **d. Alleged confrontation with Shirley about guns**

4 Without providing any context or details, plaintiff moves to exclude any evidence of “the
 5 conditions of Plaintiff’s release with respect to firearms and his alleged confrontation with
 6 Shirley” on the sole ground this evidence allegedly constitutes impermissible character and/or
 7 prior bad act evidence. Preliminarily, plaintiff cannot complain about the admission of the
 8 January 4, 1985 Clark County Superior Court Release Agreement, which includes the gun
 9 possession restriction, because plaintiff’s pretrial statement lists it as an exhibit to be admitted
 10 without redaction, and defendants have stipulated to its admission.
 11

12 More importantly, the portion of Krause’s report documenting the conflict between
 13 plaintiff and Shirley Spencer over guns demonstrates that over the course of the preceding three
 14 weeks in February of 1985 Krause had been notified of the following: (1) a domestic violence
 15 disturbance occurred at the home of plaintiff and Shirley after which plaintiff reportedly moved
 16 out of the residence and was admitted to a psychiatric hospital; (2) Detective Hulse of the
 17 Vancouver Police Department (VPD) later advised that plaintiff left the hospital, moved into a
 18 local motel, and was making statements indicating he was “going to start getting some people
 19 because he was tired of this,” specifically mentioning Krause, Davidson and numerous VPD
 20 officers by name; and (3) the Communications Center later called Krause to advise that Clark
 21 County deputies had responded again to the Spencer residence on a civil standby regarding
 22 Shirley’s refusal to give plaintiff his guns, which he noticed were missing from his gun case
 23 when he visited the residence to attend a birthday party for Matthew Hansen. Freimund Decl., at
 24 Ex. 3, pp. 1-8; and Ex. 4, pp. 1-2. This latter call prompted Krause to contact VPD, who
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1 confirmed plaintiff was to possess no weapons pursuant to the Release Agreement.

2 After providing this background, Krause's report goes on to explain how she had not had
 3 an opportunity to communicate with Shirley since conducting the initial interviews of the
 4 children in California during October 1984 and attempting to interview plaintiff, and explained
 5 her desire to contact Shirley for further follow up. The report describes how Krause tried calling
 6 Shirley and became concerned when she was unable to reach her by phone the day after the civil
 7 standby over the guns, prompting Krause to ask that a patrol unit perform a welfare check at the
 8 Spencer residence due to the events of the previous day and the threats she had been told
 9 plaintiff was making. Krause spoke with Shirley by telephone later that day and made
 10 arrangements to meet with Shirley the next day, which eventually led to Krause meeting with
 11 her son Matthew Hansen for the first time. Freimund Decl. at Ex. 4, pp. 2-4; Dkt. 64-3.

12 Ignoring these facts, plaintiff has consistently portrayed Krause's actions in contacting
 13 Shirley Spencer in February 1985 as part of her "relentless pursuit" of Shirley to enlist her help
 14 in setting up and framing plaintiff. The sequence of events described in Krause's challenged
 15 report, including the facts regarding the guns, are not being offered to prove that plaintiff acted
 16 at any point in time in accordance with any character trait related to guns, so this evidence is not
 17 inadmissible under FRE 404(a) or (b). Rather, it is being offered to establish, and is relevant to,
 18 the circumstances and context that led to Krause re-contacting Shirley in February of 1985,
 19 which then led to Matthew Hansen's disclosures of plaintiff's sexual abuse. Accordingly, it is
 20 admissible under FRE 404(b)(2).

21 **e. Alleged lie to superiors at Vancouver Police Department**

22 Plaintiff seeks to exclude evidence contained in one of defendant Krause's reports
 23 documenting an incident described by DeAnne Spencer that plaintiff had lied to his superiors at
 24

1 the VPD concerning his involvement in an undercover investigation. The only ground advanced
 2 by plaintiff in support of exclusion is that the evidence allegedly constitutes impermissible
 3 character and/or prior bad acts evidence. Defendants do not seek to introduce this report, or this
 4 specific portion of the report, to prove that plaintiff lied on any particular occasion in accordance
 5 with a character trait to lie. Rather, defendants will introduce it so that the jury will see and hear
 6 all of the information defendants were aware of during the investigation and can fairly assess the
 7 quality of the investigation, and specifically whether defendants knew or should have known
 8 plaintiff was innocent at that time.

10 **2. Motion to bar the defense from publishing and/or eliciting testimony related to**
 11 **irrelevant, highly prejudicial excerpts in defendant Krause's reports of**
 12 **interviews with DeAnne and Shirley Spencer**

13 The argument in section II.B.1.b above applies equally to this motion, including all
 14 subparts a. – d. Additional argument is set forth as needed below.

15 **a. Statements related to quality of plaintiff's marriages**

16 This evidence is essentially the same as that addressed in section II.B.1.b, and should be
 17 admitted for the same reasons.

18 **b. Statements related to plaintiff allegedly having herpes**

19 Evidence regarding the information reported to Krause by both of plaintiff's ex-wives
 20 concerning the spread of sexually transmitted disease is relevant for all of the same reasons
 21 advanced in section II.B.1.b above. In addition, DeAnne reported a suspicious rash on
 22 Kathryn's genital area, which Krause is entitled to include in her description to the jury of the
 23 totality of facts she obtained and the thoroughness of her investigation.

24 **c. Statements related to plaintiff's alleged possession of pornography**

25 Consistent with the section II.B.1.b arguments, the issue of plaintiff's reported
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possession of pornography, and children's access to it, is also specifically listed as a subject which should be covered in the "Investigating Child Sexual Abuse Allegations" outline listed by plaintiff as a trial exhibit and stipulated to by defendants. *See* Freimund Decl. at Ex. 2, pp. 3, 5, 8. Contrary to plaintiff's conclusory argument, there is nothing "absurd" about inquiring into use of pornography when investigating allegations of child sexual abuse. *See id.*

d. Additional irrelevant and prejudicial statements by DeAnne and Shirley

Consistent with the section II.B.1.b. arguments, all of the 7 subjects identified in this portion of plaintiff's motion are part of the totality of facts and circumstances defendants were aware of, and none should be redacted or eliminated from the context in which they were reported, leaving unexplained gaps in the information that was provided to defendants. Some, including subjects (3), (4), (5), (6) and (7) are more probative of the issues central to this case than others, but all are part of the background developed by defendants during the investigation, and none should be summarily stricken from the jury's consideration of the totality of the circumstances defendants knew at the time. Defendants agree with plaintiff that these subjects may be prejudicial to his case in the sense of undermining his claims, but they are not unfairly prejudicial as is required to warrant exclusion under FRE 403. *See Carter*, 617 F.2d at 972.

3. Motion to bar the defense from publishing and/or referencing defendant Krause's interview of Kathryn Roe

The only argument provided by plaintiff in support of excluding evidence of Krause's report of her interview of DeAnne Spencer's sister, Kathryn Roe, is that it is allegedly not "relevant to probable cause." As with the evidence addressed in sections II.B.1 and 2, plaintiff has improperly narrowed the scope of the remaining issues. The information defendants obtained from Kathryn Roe is part of the totality of the facts and circumstances known to them

1 during the investigation, and is relevant to the issues regarding the thoroughness of the
 2 investigation, probable cause, and whether defendants knew or should have known plaintiff was
 3 innocent. Plaintiff fails to mention that Kathryn Roe reported that she was 14 years old when
 4 plaintiff made the statements and asked the questions attributed to him, which included many
 5 other statements not listed in plaintiff's motion, which Kathryn Roe felt were "very
 6 inappropriate." Freimund Decl.at Ex. 5, pp. 2-3. Her age, and the sexual content of these
 7 statements, makes them highly probative of the above listed issues. Much of this information is
 8 also relevant because it corroborates information obtained from other witnesses.

10 Krause's report of the Kathryn Roe interview should also be admitted under FRE 106,
 11 which requires the introduction of other parts of any writing or recorded statement "that in
 12 fairness ought to be considered at the same time." All of Krause's reports from the investigation
 13 file should be admitted to give the jury the entirety of the information compiled by defendants
 14 during the investigation and to avoid misleading the jury about the full scope of the
 15 investigation. *Cf., e.g., U.S. v. Poschwatta*, 829 F.2d 1477, 1483 (9th Cir. 1987) (denying
 16 admission of entire file is proper if entirety of file is not necessary to avoid misleading jury).

18 **4. Motion to bar the defense from publishing and/or referencing defendant**
 19 **Krause's interview of Phyllis Day**

20 The same arguments advanced in response to the preceding section II.B.3 apply to this
 21 motion. Specifically, plaintiff fails to mention that Krause's report documents statements by
 22 Ms. Day which are relevant to and corroborate information obtained from other sources
 23 regarding Kathryn Spencer's desire not to visit her father during the summer when the alleged
 24 abuse occurred, and statements by Ms. Day that Kathryn never made any statement around her
 25 regarding the allegations of sexual abuse. Freimund Decl., Ex. 6, p. 2. The former statements
 26 are relevant for the reasons previously advanced; the latter statement is relevant to show

1 Krause's impartiality and thoroughness in conducting the investigation.

2 **5. Motion to bar the defense from publishing and/or referencing defendant**
 3 **Krause's interview of Linda Lawrence**

4 The same arguments advanced in response to section II.B.3 apply to this motion.
 5 Plaintiff cites "prior bad acts" as an additional ground for excluding the challenged evidence
 6 from the Linda Lawrence interview, but none of it is being offered to prove a character trait of
 7 plaintiff that he later acted in accordance with, so FRE 404 does not require exclusion.

8 **6. Motion to bar witnesses other than Matthew Hansen from testifying that Hansen**
 9 **has never recanted**

10 A centerpiece of plaintiff's liability theory is that Kathryn Tetz and Matt Spencer
 11 recanted more than 20 years after plaintiff's 1985 conviction following his 2005 release from
 12 prison. Plaintiff will undoubtedly adduce testimony from other witnesses regarding these two
 13 recantations, including how each of these two spoke to the other, to plaintiff, and to plaintiff's
 14 representatives about recanting. Plaintiff also will argue these recantations show defendants
 15 knew or should have known in 1984-85 that plaintiff was innocent and, nonetheless, conspired
 16 to deliberately fabricate false quotations of the children's disclosures.

17 In contrast, however, plaintiff argues that no witness other than Matthew Hansen should
 18 be permitted to testify to the undeniable evidence that Matthew Hansen has never recanted, or to
 19 make any reference to the sworn statement he gave in 2009 confirming plaintiff sexually abused
 20 him. *See* Dkt. 54 and 54-1. Plaintiff claims this evidence is inadmissible hearsay.

21 FRE 801(d)(1)(B) provides that a prior consistent statement by a trial witness (which
 22 Matthew Hansen will be), such as Matthew Hansen's prior statements confirming plaintiff's
 23 sexual abuse, is not hearsay when "offered to rebut an express or implied charge that the
 24 declarant recently fabricated it or acted from a recent improper influence or motive in so
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1 | testifying.” Plaintiff will, at least implicitly, contend Matthew Hansen’s 2009 non-recantation
 2 | confirming the sexual abuse was improperly influenced because he was in the Clark County Jail
 3 | at the time the statement was made. Thus, plaintiff’s hearsay objection should be overruled.

4 | Plaintiff’s motion on this subject does not seek an order precluding defense counsel from
 5 | referencing the fact that Matthew Hansen has not recanted during opening statements. Thus, any
 6 | ruling on this topic should not preclude defense counsel from making such a reference during
 7 | their respective opening statements.
 8 |

9 | **7. Motion to bar Jim Peters from testifying**

10 | Oddly, plaintiff seeks to preclude former named defendant James Peters from testifying
 11 | on the grounds that he was not identified as a witness in Davidson’s and Krause’s initial
 12 | disclosures at the outset of this litigation, and that his testimony is irrelevant. Obviously, by
 13 | naming Mr. Peters as a defendant, plaintiff knew Mr. Peters had discoverable information.
 14 | Moreover, both plaintiff and Mr. Peters identified James Peters in their initial disclosures as
 15 | having discoverable information. Freimund Decl. at Exs. 7, p. 3 (excerpts of plaintiff’s initial
 16 | disclosures) and 8, p. 2 (excerpts of former defendant Peters’ initial disclosures). Additionally,
 17 | although arguably unnecessary, both defendant Krause and defendant Davidson specifically
 18 | referenced and incorporated all other parties’ initial disclosures in answer to an interrogatory
 19 | asking for the identities of persons with knowledge and the subject matter of their knowledge.
 20 | Freimund Decl. at Ex. 9, p. 5 (Krause’s response to plaintiff’s interrogatory No. 2); and Ex. 10,
 21 | p. 5 (Davidson’s response to plaintiff’s interrogatory No. 2). *See* FRCP 26(e)(1)(A) (an initial
 22 | disclosure is required to be supplemented only “if the additional or corrective information has
 23 | not otherwise been made known to the other parties during the discovery process or in writing”).
 24 |
 25 |

26 | It would be elevating form far over substance to preclude defendants from calling a

1 former named defendant because they did not specifically identify that already named defendant
 2 in their initial disclosures, especially considering that plaintiff and former defendant Peters did
 3 initially disclose him, and plaintiff has since deposed Mr. Peters (*see, e.g.*, Dkt. 177, p. 1; Dkt.
 4 177-1, pp. 1-7). Any failure by Davidson or Krause to initially disclose Mr. Peters as a person
 5 with discoverable information at the outset of this case was harmless. *See* FRCP 37(c)(1) (an
 6 undisclosed witness may still testify if the failure to disclose was harmless). Plaintiff's attempt
 7 to transform the FRCP 26(a) initial disclosure rules into a game of "gotcha" to preclude a
 8 deposed witness from testifying at trial should not be countenanced.

10 Similarly misplaced is plaintiff's argument that Mr. Peters' testimony would be
 11 irrelevant. Among other issues, Mr. Peters' testimony is relevant to: (1) whether Kathryn Tetz
 12 and Matthew Spencer disclosed plaintiff's sexual abuse to plaintiff's criminal defense lawyer in
 13 Mr. Peters' presence, during which Mr. Peters took handwritten notes, which will be offered at
 14 trial as defendants' Exhibit A-9; (2) whether defendants objectively should have known plaintiff
 15 was innocent; (3) whether there was probable cause to arrest and prosecute plaintiff (pursuant in
 16 part to Mr. Peters' affidavit, Dkt. 63-4); (4) whether plaintiff admitted in open court in Mr.
 17 Peters' presence when the sentencing court accepted plaintiff's *Alford* plea of guilt that plaintiff
 18 had no evidence to contradict the evidence against him and could not remember whether he
 19 sexually abused the children (which is what Krause reported plaintiff previously said to her and
 20 Davidson, Dkt. 64-4, pp. 3-5); (5) whether Mr. Peters exercised independent judgment when
 21 seeking plaintiff's imprisonment; (6) whether defendants each had a reputation for truthfulness;
 22 and (7) if defendant's motion to exclude the videotaped interview is denied, whether Kathryn
 23 Tetz made similar disclosures to him when he interviewed her as she made to Shirley Spencer
 24 and Krause (as this Court previously found was the case, Dkt. 174, pp. 19-20).

Although plaintiff is correct that Mr. Peters has not been identified as an expert witness that does not mean he is prohibited from properly offering lay opinions pursuant to FRE 701. Plaintiff's request for a blanket prohibition on Mr. Peters offering any lay opinions based on, for example, his perceptions developed from interactions with Kathryn Tetz, Matt Spencer, plaintiff, defendants and others should be overruled. If plaintiff believes a particular line of questioning or response from Mr. Peters at trial violates FRE 701, he should raise an objection at that time. *See, e.g., Gresh v. Waste Serv. Of Am., Inc.*, 738 F.Supp.2d 702, 706 (E.D.Ky. 2010) (unless evidence is clearly inadmissible on all potential grounds, ruling on motions in limine "should be deferred until trial so that questions of foundation, relevancy and potential prejudice may be resolved in proper context"). A blanket prohibition against lay opinions by Mr. Peters, or any other witness, is contrary to FRE 701 and should be denied.

8. Motion to bar any defense witness from offering a personal opinion as to plaintiff's guilt

Plaintiff seeks a blanket order prohibiting all defense witnesses from presenting a lay opinion, or defense expert Rebecca Roe from offering an expert opinion, that they believed plaintiff was guilty, claiming such evidence would be irrelevant. This motion overlooks the fact that plaintiff must prove defendants knew or should have known plaintiff was innocent, and that probable cause was lacking that he committed a crime. *See, e.g., Devereaux*, 263 F.3d at 1076; 9th Cir. Model Civil Jury Instrs. 9.20. In effect, plaintiff is suggesting defendants can offer no defense concerning their beliefs as to guilt and probable cause, thereby creating an inference that defendants concede these critical points.

To rebut plaintiff's claims, defendants should be entitled to present their theory of the case by testifying they genuinely believed plaintiff was guilty and there was a fair probability he had committed a crime, and to deny in front of the jury that they knew or should have known he

1 was innocent or that probable cause was lacking. Defendants also should be permitted to
 2 present testimony and evidence that their beliefs as to guilt and probable cause were objectively
 3 reasonable by adducing evidence from other knowledgeable individuals who had similar beliefs
 4 based on their own involvement with plaintiff and/or his child victims. If defendants are
 5 precluded from offering this evidence from other witnesses, the jury could infer no objectively
 6 reasonable person would have believed plaintiff was guilty or that probable cause existed to
 7 believe plaintiff committed a crime. Testimony concerning whether defendants believed, and
 8 whether it was objectively reasonable for defendants to believe, plaintiff was guilty and/or that
 9 there was a fair probability he committed a crime is relevant because such testimony goes to the
 10 key issues in the case. Plaintiff's argument that such testimony is irrelevant should be overruled.

11
 12 **9. Motion to bar defendant Krause from testifying as an expert in child sex abuse**
 13 **cases**

14 Plaintiff seeks to preclude defendant Krause "from testifying as an expert as to Plaintiff's
 15 competence, CSAAS [1983 Roland C. Summit, M.D., publication entitled "The Child Sexual
 16 Abuse Accommodation Syndrome"] and/or false denials in child sex abuse cases," arguing that
 17 these would be improper lay opinions under FRE 701 and cannot be expressed as expert
 18 opinions because Krause did not disclose herself as an expert.² Plaintiff also cites, but does not
 19 discuss, the FRE 701 Advisory Committee Notes (2000 Amendments), which actually
 20 undermine plaintiff's position. These Advisory Committee Notes cite with approval to authority
 21 for the proposition that "there is no good reason to allow what is essentially surprise expert
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 23

24 ² Defendants have moved in limine to preclude evidence or argument that plaintiff was incompetent when he
 25 entered his guilty plea and was sentenced. Dkt. 201, pp. 6-7. If that motion is granted and evidence or argument
 26 about claimed incompetence is excluded, defendants do not anticipate offering any evidence regarding plaintiff's
 competence. Plaintiff now concedes his competence at the time of his plea and sentencing "are not at issue." Dkt.
 202, p. 26, ll. 14-15.

1 testimony” and that “the Court should be vigilant to preclude manipulative conduct designed to
2 thwart the expert disclosure and discovery process.”

3 Defendant Krause will be testifying as a lay witness based on her participation in the
4 investigation of plaintiff. Plaintiff claims that Krause purposely falsified child sexual abuse
5 statements during her investigation, when she knew or should have known plaintiff was
6 innocent. Defendant Krause is entitled to testify to the actions she took and conclusions she
7 drew during this investigation in order to defend against plaintiff’s claims. Her testimony on
8 these points will not come as a surprise to plaintiff because he deposed her after receiving her
9 entire investigative file, as well as records concerning her training and experience. Under these
10 circumstances, it is plaintiff who appears to be attempting to manipulate the rules governing
11 disclosure of anticipated testimony by seeking to prevent Krause from fully explaining her
12 actions and conclusions during the investigation.
13

14 Defendants are unaware of any case, and plaintiff has cited none, requiring a named
15 defendant to disclose herself as an expert when her testimony consists solely of the actions taken
16 and conclusions drawn by her during the investigation. Even as to non-party police witnesses,
17 the law is to the contrary. The fact that Krause’s testimony about the investigation and the
18 conclusions she drew will be based in part upon her training and experience does not make her
19 testimony expert testimony for purposes of the rules. In *U.S. v. Oriedo*, 498 F.3d 593, 601-02
20 (7th Cir. 2007), an investigating police officer was allowed to testify as a lay witness under FRE
21 701 to his participation in a controlled drug buy and to his concerns regarding possible counter-
22 surveillance activities, even though his “specialized knowledge informed his mental state.” See
23 also *Colon-Diaz v. U.S.*, 899 F.Supp.2d 119, 135-38 (D. Puerto Rico 2012) (twelve year veteran
24 police officer held to have testified as a lay witness where his testimony “was based on his direct
25
26

1 observation of the criminal activities and drug-related transactions ..., his experience as a
 2 narcotics agent, his examination of the recording of the ... drug point made by confidential
 3 informant Ketsy Cardona, and corroborating the information provided by Ketsy). Plaintiff's
 4 motion for a blanket prohibition on Krause offering any lay opinions as permitted by FRE 701
 5 should be denied.

6
 7 **10. Motion to bar any lay or expert testimony that Katie Spencer, Matt Spencer, or**
 8 **Matt Hansen exhibited behavioral characteristics consistent with victims of**
 9 **sexual abuse**

10 Defendant Krause's reports document that she asked questions of DeAnne Spencer,
 11 Shirley Spencer and others about the behavior of the alleged child sexual abuse victims around
 12 the times of the alleged abuse. Any of these witnesses with personal knowledge are competent
 13 to testify to behaviors which they observed. Consistent with the authorities and reasoning in the
 14 preceding section, Krause is entitled to testify to whatever significance she placed upon the
 15 information she received in order to defend against plaintiff's claim that she fabricated evidence
 16 while she knew or should have known plaintiff was innocent.

17 The cases cited by plaintiff in support of this motion are inapposite. *U.S. v. Bighead*, 128
 18 F.3d 1329 (9th Cir. 1997) involved a foundational challenge to a rebuttal expert who testified
 19 about certain characteristics of child sexual abuse victims, but she had never examined or
 20 interviewed the victim at issue, and did not testify about the facts of that particular case. *Id.*, at
 21 1330. *U.S. v. Antone*, 981 F.2d 1059 (9th Cir. 1992) was also a case involving a foundational
 22 challenge to admitting expert testimony about general behavior characteristics of sexually
 23 abused children, rather than testimony about the specific victim or the specific investigation at
 24 issue. Neither case supports plaintiff's motion, which seeks to preclude the investigating
 25 detective from explaining the basis for her beliefs and conclusions drawn as a result of her
 26

1 observations and information received during the course of her investigation.

2 Finally, this motion is puzzling because it is inconsistent with plaintiff's trial exhibit 98,
3 to which defendants have stipulated to admissibility. Exhibit 98 is a training guide authored by
4 defendant Krause entitled "Behavioral Indicators That May Be Consistent With Child Abuse."
5 Admitting this stipulated exhibit while precluding witnesses from describing the behavioral
6 indicators present in this case would be confusing, and prevent the jury from hearing about all of
7 the circumstances known to defendants that supported probable cause and their belief in guilt.
8

9 **11. Motion to bar any and all documents and/or testimony referencing the**
10 **Vancouver Police Department's internal investigation and/or bases for**
11 **terminating plaintiff's employment**

12 While defendants were conducting the criminal investigation of plaintiff, his employer,
13 the VPD, was conducting its own internal affairs investigation. The two agencies communicated
14 with each other regarding the progress and results of their respective investigations. The VPD
15 terminated plaintiff's employment on January 8, 1985, citing three separate findings: (1) That
16 while residing in California plaintiff forcibly and without consent compelled Rhonda Short to
17 engage in sexual intercourse; (2) that plaintiff falsely reported information to his superiors while
18 working on an undercover investigation of gambling activities, and engaged in an on-going
19 sexual relationship with an undercover informant without the knowledge or approval of his
20 superiors; and (3) that plaintiff had sexual contact with and engaged in or attempted to engage in
21 sexual intercourse with his daughter Kathryn, then age 5. Dkt. 63-3.

22 The only basis asserted for exclusion of evidence of the VPD investigation and
23 termination of plaintiff's employment is that it is allegedly irrelevant. To the contrary, this
24 evidence is highly probative of whether defendants knew or should have known they were
25 investigating an innocent suspect, and whether it was objectively reasonable to conclude there
26

1 was probable cause to arrest. The fact that VPD Chief Leland Davis independently determined
 2 plaintiff was not innocent and there was at least probable cause sufficient to justify plaintiff's
 3 termination is relevant. Plaintiff's tactical decision not to seek alleged lost wages does not affect
 4 the relevance of this evidence to these critical issues.

5 **12. Motion to bar the defense from calling James Rulli**

6 Plaintiff argues that James Rulli, his former criminal defense attorney from the time of
 7 plaintiff's arrest through his *Alford* plea of guilty and sentencing, should be prohibited from
 8 testifying because any testimony concerning Mr. Rulli's representation of plaintiff would violate
 9 the attorney-client privilege. However, as plaintiff knows, Mr. Rulli has already provided
 10 testimony relevant to this case during the 1996 evidentiary hearing before Judge Bryan of this
 11 Court. Specifically, he testified that he interviewed Kathryn Tetz and Matt Spencer in the
 12 presence of Mr. Peters in May 1985, shortly before plaintiff pled guilty. *See* Freimund Decl. at
 13 Ex. 3 (excerpts from 1996 hearing), at pp. 406-07 (stating the children's disclosures seemed
 14 credible); *see also* Dkt. 63-8, pp. 24, 27-28 (references to Mr. Rulli's interviews of the children
 15 during plaintiff's plea hearing). Testimony by Mr. Rulli concerning his interviews of the
 16 children is not subject to the attorney-client privilege because the children were not his client, an
 17 opposing lawyer, Mr. Peters, was present, Mr. Rulli's client was not present, and no confidential
 18 communication with his client was involved. Therefore, plaintiff's motion to preclude Mr. Rulli
 19 from testifying based on the attorney-client privilege should be denied.

22 **13. Motion to bar testimony from any witness about what Katie and Matt Spencer 23 allegedly said during an interview on May 9, 1985 in Sacramento**

24 In addition to seeking to bar James Rulli from testifying about his interviews of the
 25 children in May 1985, plaintiff also seeks to bar anyone else, such as Mr. Peters, from testifying
 26 about those interviews, claiming it would be "irrelevant hearsay." Yet, evidence that Kathryn

1 Tetz and Matt Spencer disclosed substantially the same sexual abuse to James Rulli and James
 2 Peters in May 1985 (outside of Krause's presence) as they disclosed to defendant Krause two
 3 months earlier (*see* Dkt. 64-5 and 64-6) is certainly relevant to whether Krause fabricated the
 4 children's disclosures. The fact that the children told Mr. Rulli and Mr. Peters' substantially the
 5 same information as they told Krause has a tendency to show Krause did not fabricate the
 6 children's statements, which certainly is a fact of consequence in the case. This evidence is also
 7 relevant to whether defendants' alleged conduct proximately caused plaintiff's imprisonment
 8 given that he changed his plea to guilty the day after his attorney independently interviewed the
 9 children in May 1985. *See, e.g.*, Dkt. 136, p. 4, ll. 9-14.

11 Plaintiff's hearsay objection regarding the children's May 1985 statements also should
 12 be overruled.³ An out-of-court statement that is not offered to prove the truth of the matter
 13 asserted in the statement is not hearsay. FRE 801(c)(2). Defendants are not offering the
 14 children's May 1985 statements to the two lawyers to prove the truth of the matters asserted by
 15 the children at that time - - *i.e.*, to prove plaintiff sexually abused them. Plaintiff's guilt or
 16 innocence is not a matter at issue in this civil trial. What is at issue is whether defendants
 17 fabricated previous statements by the children and whether defendants knew he was innocent.
 18 The children's statements to the two lawyers are offered to prove defendants did not fabricate
 19 the previous statements of the children by showing they later made consistent statements to the
 20 two lawyers outside of Krause's presence. In other words, the evidence is not being offered to
 21 prove the truth of what the children said about plaintiff, but rather to prove that what they said to
 22 the two lawyers was substantially similar to what they previously told defendant Krause.

23
 24
 25
 26 ³ Although plaintiff makes a conclusory statement the children's May 1995 disclosures should be excluded as
 "irrelevant hearsay," he only presents an argument regarding relevancy, not hearsay.

1 Additionally, the evidence is being offered to show the children's disclosures to plaintiff's
 2 criminal lawyer proximately caused him to plead guilty, which caused his alleged damages
 3 flowing from his imprisonment.

4 **14. Motion to bar any reference or suggestion to witnesses having been former**
 5 **parties and/or having a financial stake in the outcome of the case**

6 Plaintiff does not directly argue that evidence that Kathryn and Matthew Spencer were
 7 originally plaintiffs is irrelevant, but he does so indirectly by arguing their dismissal means
 8 "they no longer have any stake in this litigation." The potential bias of a party to a lawsuit is a
 9 proper subject of inquiry. *Great Am. Indem. Co. of N.Y. v. Garrison*, 75 F.Supp. 811, 814-15
 10 (E.D. Wash. 1948); 9th Cir. Model Civil Jury Instrs. 1.11. Their bias did not vanish when their
 11 claims were dismissed as time-barred. Plaintiff's concerns that the jury might speculate about
 12 the status of these two witnesses as former plaintiffs does not render the evidence inadmissible
 13 under FRE 403.

15 **15. Motion to bar Rebecca Roe from testifying at trial**

16 Plaintiff argues Rebecca Roe should be precluded from testifying at trial on the grounds
 17 that she was not identified as a fact witness in Davidson's and Krause's initial disclosures at the
 18 outset of this litigation, and that her testimony is irrelevant. However, both plaintiff and former
 19 defendant Peters did identify Ms. Roe in their initial disclosures as having discoverable
 20 information. Freimund Decl. at Ex. 7, p. 4 (excerpts of plaintiff's initial disclosures) and Ex. 8,
 21 p. 5 (excerpts of former defendant Peters' initial disclosures). Moreover, Krause and Davidson
 22 specifically referenced and incorporated all other parties' initial disclosures in answer to an
 23 interrogatory asking for the identities of persons with knowledge and the subject matter of their
 24 knowledge. Freimund Decl. at Ex. 9, p. 5 (Krause's response to plaintiff's interrogatory No. 2);
 25 and Ex. 9, p. 5 (Davidson's response to plaintiff's interrogatory No. 2).
 26

1 Again, it would be elevating form over substance to preclude defendants from calling a
 2 witness because they did not specifically identify her in their initial disclosures, even though
 3 plaintiff and another party had identified her in their initial disclosures, especially considering
 4 that plaintiff has since deposed Ms. Roe (*see, e.g.*, Dkt. 134-10, pp. 2-9). Any failure by
 5 Davidson or Krause to initially disclose Ms. Roe as a person with discoverable information at
 6 the outset of this case was harmless. *See* FRCP 26(e)(1)(A) (an initial disclosure is required to
 7 be supplemented only “if the additional or corrective information has not otherwise been made
 8 known to the other parties during the discovery process or in writing”); FRCP 37(c)(1)
 9 (undisclosed witness may still testify if the failure to disclose was harmless).

11 Plaintiff also argues Ms. Roe should be barred from testifying because Davidson and
 12 Krause failed to timely disclose her as their expert, and merely “adopted” former defendant
 13 Peters’ disclosure of Ms. Roe as an expert. Putting aside that “adopting” a co-defendant’s
 14 disclosure of an expert is sufficient notice of a defendant’s intent to call that expert, the fact is
 15 Davidson did specifically disclose Ms. Roe as one of his experts. Freimund Decl. at Ex. 11, pp.
 16 3-4 (Davidson’s FRCP 26(a)(2) expert witness disclosure dated October 9, 2012). Thus,
 17 plaintiff is mistaken that defendants failed to adequately disclose Ms. Roe as an expert.

19 Similarly mistaken is plaintiff’s argument that any testimony from Ms. Roe would be
 20 irrelevant. Plaintiff fails to mention this Court has previously ruled that “it will likely qualify
 21 Roe as an expert under Fed. R. Evid. 702 and permit her to testify to her December 1984
 22 evaluation of Spencer’s case [and] to fully explore what Roe’s opinions would be were the
 23 later discovered evidence against Spencer known to her ... [and] the considerations made by law
 24 enforcement officers in determining the existence of probable cause.” Dkt. 131, p. 8, ll. 16-18;
 25 p. 9, ll. 12-13 and ll. 15-17. As discussed above, probable cause is a complete defense to
 26

1 plaintiff's claims, so expert testimony from Ms. Roe that probable cause existed is relevant.

2 Ms. Roe's testimony that a reasonable person/prosecutor reading Krause's police reports
3 would not know she fabricated the children's disclosures also is relevant to Davidson's alleged
4 liability. Plaintiff claims Davidson should have known Krause was falsely quoting the children,
5 just as plaintiff Peters should have known the same. Ms. Roe's testimony applies equally to
6 Davidson and Peters.
7

8 Finally, Krause testified at her deposition that she recalls discussing Ms. Roe's
9 November 1984 opinion that Kathryn "was clearly abused and probably by" plaintiff (Dkt. 63-1)
10 during the course of her investigation. Freimund Decl. at Ex. 12, pp. 34-36. Thus, Ms. Roe's
11 November 1984 opinion is relevant to whether Krause knew plaintiff was innocent.
12

13 **16. Motion to bar reference to Roe's practice as a plaintiff's attorney and the like**

14 The jury will be instructed to consider Ms. Roe's education and experience when deciding
15 how much weight to give to her expert testimony. 9th Cir. Model Civ. Jury Instrs. 2.11. Thus, her
16 experience is relevant contrary to plaintiff's claim that her professional experiences for the past 19
17 years is irrelevant. After serving as a prosecutor for 17 years, Ms. Roe has been a personal injury
18 plaintiff's attorney for the last 19 years. Plaintiff concedes the jury should be permitted to hear
19 what Ms. Roe did from 1977 to 1994, but argues defendants can not adduce any evidence about
20 what her experiences have been for the ensuing 19 years. Barring such evidence would create an
21 untrue inference that she has done nothing since 1994. Her entire experience is relevant, and the
22 jury is entitled to give her professional experience what ever weight they deem appropriate.
23

24 **17. Motion to bar evidence pertaining to the fact that defendant Krause reported an** 25 **affair between a Sheriff's deputy and an alleged victim in another case**

26 Plaintiff argues that testimony about the circumstances under which Krause reported

1 another deputy's affair with a sexual assault victim during an investigation is inadmissible under
 2 FRE 404(b). However, neither case cited by plaintiff supports his position. In *U.S. v. Shavin*, 287
 3 F.2d 647 (7th Cir. 1961), the defendant was charged with using mail to transmit inaccurate medical
 4 bills with intent to defraud, and the prosecution challenged the admissibility of the defendant's offer
 5 to prove other transactions by mail where medical bills were as represented. The court ruled it was
 6 reversible error to exclude the defendant's proffered evidence, explaining that the prosecution "was
 7 properly permitted to introduce evidence of similar transactions to prove fraudulent intent, and
 8 conversely the defendant should be entitled to negate the fraudulent intent by the evidence which
 9 was offered." *Id.*, at 653-54. Similarly, in *Ansell v. Green Acres Cont. Co., Inc.*, 347 F.3d 515 (3rd
 10 Cir. 2003), a defendant in an age discrimination civil case was allowed to introduce evidence that
 11 several years after he fired the plaintiff, he hired an employee within the same age class to rebut
 12 plaintiff's evidence of discriminatory intent.
 13

14
 15 Here, the evidence of Krause's reporting of a deputy for engaging in an affair with an
 16 alleged victim during an investigation is relevant to and offers circumstantial evidence of Krause's
 17 state of mind and intent regarding the alleged conspiracy with Davidson to frame plaintiff so
 18 Davidson could have an affair. Plaintiff will be attempting to prove the conspiracy and necessary
 19 meeting of the minds through circumstantial evidence, and defendants are entitled to rebut that
 20 evidence with the proffered evidence. See *U.S. v. Rosa*, *supra*.
 21

22 **18. Motion to bar Phillip Esplin, Ed.D, from testifying at trial**

23 Plaintiff argues Dr. Esplin should be barred from testifying because his testimony is now
 24 irrelevant. The real reason plaintiff seeks to exclude Dr. Esplin is that he chose not to depose him,
 25 so he is uncertain of how to cross-examine him. While it is true that a portion of Dr. Esplin's
 26 previously disclosed opinions dealt with plaintiff's inability to show that reasonable investigators in

1 1984-85 would have known the interview techniques used in this case were improperly coercive,
 2 that is not the entirety of his disclosed opinions. Davidson's timely disclosure of Dr. Esplin's
 3 opinions expressly referenced and incorporated his expert report. Dkt. 203-1, p. 3, ll. 7-8. His
 4 report discussed several topics relevant to plaintiff's remaining claims. *See* Dkt. 134-4, pp. 2-34.

5 For example, Dr. Esplin will provide opinion testimony consistent with his expert report
 6 that during the 1984-85 time period the training and education received by field professionals
 7 was that false allegations of sexual abuse by children were extremely rare (Dkt. 134-4, pp. 5, 27-
 8 28, 33-34), the reasons why children are sometimes reluctant to disclose sexual abuse (*id.*, pp. 3,
 9 5, 27-28, 33), the reconstructive nature of memory and the extent of knowledge among field
 10 professionals about such issues during the 1984-85 time period (*id.*, pp. 3-5, 28-29, 32-33),
 11 recantations or denials of sexual abuse were more likely false than true, the dynamics that
 12 commonly lead to recantations, the reliability of the same (*id.*, pp. 5, 28, 33-34), and, if the
 13 medical reports regarding Kathryn Spencer and Matt Hanson are admitted over defendants'
 14 objections, the reasons why corroborating medical evidence is frequently lacking in child sexual
 15 abuse cases (*id.*, p. 28). This testimony is relevant to whether probable cause existed, whether
 16 defendants knew or should have known in 1984-85 the children's disclosures were true, whether
 17 Matt Spencer's initial denial was false, whether plaintiff was innocent, and to help the jury
 18 understand and evaluate the dynamics of Kathryn's and Matt Spencer's later recantations after
 19 plaintiff was released from prison.

22
 23 **19. Motion to bar the use of hearsay statements made by Katie Spencer, Matt**
 24 **Spencer, and Matt Hansen**

25 Plaintiff concedes the relevance and admissibility of statements made by the child victims
 26 to Krause, but then speculatively argues that if other witnesses attempt to testify about statements

made to them by the children and if such statements were offered to prove the truth of the matters asserted, then they would be inadmissible hearsay under FRE 801 and should be excluded. This motion is far too vague and speculative to provide the Court with a basis for granting the requested relief. Defendants have demonstrated the admissibility of statements made by the children to James Rulli and James Peters in other sections herein. This vague, unspecified motion should be denied.

20. Motion to bar inadmissible testimony from DeAnne Spencer

Defendants disclosed in their pretrial statement they will use DeAnne Spencer's videotaped deposition at trial. The parties will be presenting any objections and responses to objections to the Court where applicable on the DeAnne Spencer deposition transcript pursuant to W.D. Local Rule 32(e). The copy of the transcript filed after the Court has ruled on all objections would render any order entered on this motion superfluous, so a ruling on this motion should be reserved.

As for the motion's merits, plaintiff fails to cite any rule or reason why any of the subjects listed in items (a) – (j) are "improper" and should be excluded. In fact, many of these specific subjects are duplicative of plaintiff's other motions in limine, which defendants have demonstrated involve admissible evidence, including (b) (*see* section II.B.1.b); (c) and (f) (*see* section II.B.9 and 10); and (g) (*see* section II.B.2.b). In addition, these and all of the other challenged subjects are relevant to the totality of the circumstances known to defendants, whether they reasonably believed probable cause existed, and whether they knew or should have known plaintiff was innocent.

21. Motion to bar DeAnne Spencer from testifying as to the Katie Spencer medical exam

Plaintiff contests the relevancy of DeAnne Spencer's testimony that Kathryn's medical examination was incomplete because Kathryn would not allow her clothing to be removed. Plaintiff claims only the medical report is relevant, so any evidence the medical report may be

1 inaccurate is irrelevant.⁴ This one-sided approach that only evidence favorable to his case is
 2 relevant is incorrect. Regardless of whether DeAnne Spencer's recollection of the examination was
 3 communicated to defendants, her testimony about the examination goes to the weight the jury may
 4 place on the accuracy of the report, assuming the report is admitted contrary to defendant's motion
 5 in limine advocating its exclusion.

6 **22. Motion to bar the defense from referencing plaintiff's plea as a "guilty plea"**

7
 8 Plaintiff argues it is misleading to refer to his *Alford* plea as a guilty plea. He cites three
 9 cases in support that all deal with *Alford* pleas. Yet, all three cases plaintiff relies on consistently
 10 refer to an *Alford* plea as a "guilty plea" because an *Alford* plea is merely one type of guilty plea.
 11 As these cases indicate, although an *Alford* plea is not an admission of guilt, it is nonetheless a
 12 "guilty plea." It certainly is not a "not guilty" plea. When asked at his sentencing how he pled to
 13 the charges against him, plaintiff responded "Guilty." Dkt. 63-8, p. 38, ll. 9-13. He also signed a
 14 "Statement of Defendant on Plea of Guilty" (Dkt. 63-7), which defendants will be offering as an
 15 exhibit. Is plaintiff suggesting this document should be redacted to remove the phrase "Plea of
 16 Guilty"? Plaintiff's motion to bar any reference to his plea as a "guilty plea" should be denied
 17 because it is not misleading to refer to his *Alford* plea as a being a type of "guilty plea."
 18

19 **23. Motion to bar transcript of *Alford* plea hearing (May 16, 1985), sentencing** 20 **hearing (May 23, 1985) and evidence/argument that plaintiff's guilt can be** 21 **inferred from *Alford* plea and sentencing hearings**

22 Plaintiff seeks to bar admission of the transcripts of his plea and sentencing hearings on the
 23 grounds the transcript is unfairly prejudicial and misleading because he was allowed to withdraw
 24 his guilty plea based on his children's recantations decades later. The jury will certainly hear
 25

26 ⁴ Defendants have moved in limine to exclude Kathryn's medical report. If this motion is granted, defendants agree DeAnne's testimony regarding the report should be excluded. However, if defendant's motion is denied, this portion of DeAnne's testimony should be permitted for the reasons set forth above.

1 evidence of these later recantations and the Clark County Prosecutor's later decision to voluntarily
 2 dismiss the charges against him without prejudice, so the jury will not be misled that plaintiff's
 3 guilty plea was later withdrawn.

4 Although his guilty plea is indeed prejudicial, it is not unfairly so. Publishing plaintiff's
 5 statements made during the plea and sentencing hearing is no different from publishing statements
 6 plaintiff made in his deposition that are unfavorable to his liability theories. They are admissions of
 7 a party opponent. *See* FRE 801(d)(2). For example, his admissions that he reviewed the
 8 prosecution's evidence against him with his attorney and, despite any defense he had to that
 9 evidence, he had no question in his mind that a jury would find him guilty beyond a reasonable
 10 doubt (Dkt. 63-8, pp. 21-22) is material to defendants' theory that they should not have known
 11 plaintiff was innocent or that probable cause was lacking. Plaintiff's statements during the plea
 12 hearing also demonstrate that Krause did not fabricate statements plaintiff had previously made to
 13 defendants, such as plaintiff's statement during the plea hearing that "I don't remember"
 14 committing the crimes. *Compare* Dkt. 63-8, p. 22, ll. 17-23 *with* Dkt. 64-4, pp. 4-5.

17 **24. Motion to bar witnesses first disclosed in defendants' pretrial statement**

18 Plaintiff seeks to bar four of defendants' witnesses (Robert Songer, Roger Kessel, Bill
 19 Griffith and Joe Dunegan) from testifying claiming they were not disclosed until November 26,
 20 2013, when defendants served their joint pretrial statement. He is incorrect. All four witnesses
 21 were timely disclosed by defendants in October 2012 in response to plaintiff's interrogatories, well
 22 before the discovery cut-off in January 2013. Freimund decl. at Ex. 9, pp. 5-6; and Ex. 10, pp. 5-6.
 23 Plaintiff's decision not to depose these timely disclosed witnesses is no reason to warrant exclusion.
 24

25 **25. Motion to bar Leland Davis from testifying at trial**

26 Defendants addressed plaintiff's arguments regarding the relevancy of former VPD Chief

1 Davis' testimony above, in section II.B.11. The only additional objection plaintiff raises in this
 2 motion is a one sentence, conclusory argument that Chief Davis' "testimony regarding interviews
 3 conducted by other individuals would be hearsay." Plaintiff provides no specificity about what
 4 "interviews" he is referring to, so defendants are unable to respond. If plaintiff believes some
 5 portion of Chief Davis' trial testimony is hearsay, he should object at that time, and a determination
 6 can be made as to the applicability of any hearsay exception, such as the state of mind exception.
 7

8 **26. Motion to bar Thomas Lodge from testifying at trial**

9 Plaintiff seeks to bar Judge Lodge from testifying about Krause's integrity and work ethic.
 10 Plaintiff also seeks to bar Judge Lodge from testifying about plaintiff's plea and sentencing
 11 hearings because plaintiff claims such testimony is irrelevant. Defendants addressed the relevance
 12 of the plea and sentencing hearings above, in section II.B.23.

13 Plaintiff objects to Judge Lodge testifying about "anything regarding Defendant Krause"
 14 because such testimony allegedly was not encompassed within defendants' disclosure that Judge
 15 Lodge would testify "as to his involvement in the prosecution" of plaintiff. Yet, Krause's October
 16 2012 interrogatory responses notified plaintiff that "[i]n addition to the subjects of knowledge listed
 17 for each witness in those [initial] disclosures, all of the witnesses in the Clark County, Washington
 18 area who were employed in ... the judiciary are believed to have knowledge of Sharon Krause's
 19 experience ... and her honesty, integrity and work ethic." Freimund Decl. at Ex. 9, p. 5.
 20

21 Additionally, as plaintiff recognizes, because he made an *Alford* plea, Judge Lodge had to
 22 "establish an entirely independent factual basis for the plea, which substitutes for an admission of
 23 guilt." Dkt. 202, p. 22, ll. 20-21. Part of this independent basis was his reliance on Krause's
 24 testimony at the plea hearing. *E.g.*, Dkt. 63-8, p. 33. Thus, his view regarding Krause's integrity
 25 and work ethic necessarily colored his independent factual determination of the basis for plaintiff's
 26

1 guilt and is encompassed within the broad disclosure that he would testify about “his involvement
2 in the prosecution” of plaintiff.

3 **27. Motion to bar impermissible character evidence**

4 Plaintiff argues that all testimony by any witness regarding defendants’ honesty, integrity
5 and work ethic should be excluded as inadmissible character evidence under FRE 404(a). Yet, FRE
6 608(a) allows admission of evidence of truthful character in the form of reputation or opinion for
7 having a character for truthfulness, “[b]ut ... only after the witness’s character for truthfulness has
8 been attacked.” Plaintiff tries to brush this exception aside by claiming that he does not intend to
9 attack either defendant’s “general character for truthfulness as a witness.” This argument is directly
10 contrary to plaintiff’s claims against defendants in this case, which are that Krause lied repeatedly
11 while quoting the child victims in her interview reports, that Davidson encouraged her to do so
12 pursuant to an alleged conspiracy between both defendants to falsely convict an innocent suspect,
13 and that Krause repeated the lies when communicating with the prosecutors and the Court.
14

15 “It is for the trial court, exercising its discretion, to determine whether given conduct
16 constitutes a direct or indirect attack on a witness’s character for truthfulness.” *U.S. v. Dring*, 930
17 F.2d 687, 691 (9th Cir. 1991). Plaintiff’s allegations about a pattern of untruthful conduct by
18 defendants constitute the kind of direct attack on each defendant’s character for truthfulness that
19 justifies admission of rehabilitative character evidence. *See, e.g., State v. Eugenio*, 579 N.W.2d 642
20 (Wis. 1998) (citing *Dring* with approval and holding a defendant’s argument and cross-examination
21 of a witness/victim allegedly sexually abused by the defendant to the effect that the victim told
22 inconsistent stories about the abuse and repeated a lie opened the door for the prosecution to
23 introduce rehabilitative evidence of character for truthfulness).
24
25

26 RESPECTFULLY SUBMITTED this 9th day of December, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on December 9, 2013, I caused to be electronically filed Defendants' Response to Plaintiff's Motions in Limine with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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